ISSN 1198-6182

Office of the Information and Privacy Commissioner
Province of British Columbia
Order No. 293-1999
February 15, 1999

****** This Order has been subject to Judicial Review ******

INQUIRY RE: The Sierra Legal Defence Fund's request for a review of a Ministry of Forests fee estimate and subsequent refusal to waive the fee

Fourth Floor
1675 Douglas Street
Victoria, B.C. V8V 1X4
Telephone: 250-387-5629
Facsimile: 250-387-1696
Web Site: http://www.oipcbc.org

1. Description of the review

As Information and Privacy Commissioner, I conducted a written inquiry at the Office of the Information and Privacy Commissioner (the Office) on October 29, 1998 under section 56 of the *Freedom of Information and Protection of Privacy Act* (the Act). This inquiry arose out of a request for review by the Sierra Legal Defence Fund (SLDF; the applicant) of both the fee requested by the Ministry of Forests (the Ministry) and the Ministry's refusal to grant a fee waiver.

2. Documentation of the inquiry process

The applicant wrote to the Ministry on May 26, 1998 to request copies of all correspondence, including emails and memoranda, between six named individuals, (two public servants and four employees of forest companies), authored between November 24, 1997 and March 31, 1998. The Ministry informed the applicant that the estimated fee for responding to the request was $438.25, and that it required payment of a deposit of $219.13 before it would proceed. The applicant wrote to my Office on June 23, 1998 to request a review of the Ministry's response, asked the Ministry again on July 15, 1998 to waive the fee, and then requested a review of the Ministry's refusal to waive the fee. Contrary to the Ministry's repeated assertions, I note that the applicant asked for a fee waiver in the public interest in its original letter of request for records of May 26, 1998. But the applicant did not provide detailed reasons for such a waiver in response to the Ministry's initial fee estimate until July 15, 1998. In addition, I have accepted the applicant's letter dated June 23, 1998 as a request to review the fee estimate.

On August 27, 1998 my Office issued a Notice of Written Inquiry for an inquiry to be held September 21, 1998. On September 2, 1998 the Ministry wrote to ask that the inquiry be rescheduled to October 5, 1998, with initial submissions due on September 25, 1998, and reply submissions due on October 2, 1998. I agreed and, subsequently, when the applicant wrote on October 1, 1998 to ask for an additional two weeks to submit its reply submissions, adjourned the inquiry to October 14, 1998. After receiving a copy of the applicant's reply submissions on October 13, 1998, the Ministry wrote to object and to ask for additional time to prepare a response to new facts and issues raised by the applicant. Consequently, I adjourned the inquiry a third time to October 29, 1998.

3. Issues under review and the burden of proof

The issues in this inquiry are the Ministry's fee estimate and its decision under section 75(5) of the Act to refuse to waive the estimated fee for responding to the applicant's request for records. Section 75 reads as follows:

75(1) The head of a public body may require an applicant who makes a request under section 5 to pay to the public body fees for the following services:

(a) locating, retrieving and producing the record;

(b) preparing the record for disclosure;

(c) shipping and handling the record;

(d) providing a copy of the record.

(2) An applicant must not be required under subsection (1) to pay a fee for

(a) the first 3 hours spent locating and retrieving a record, or

(b) time spent severing information from a record.

…

(4) If an applicant is required to pay fees for services under subsection (1), the public body must give the applicant an estimate of the total fee before providing the services.

(5) The head of a public body may excuse an applicant from paying all or part of a fee if, in the head's opinion,

(a) the applicant cannot afford the payment or for any other reason it is fair to excuse payment, or

(b) the record relates to a matter of public interest, including the environment or public health or safety.

….

Section 57 of the Act, which establishes the burden of proof on parties in an inquiry, is silent with respect to a request for review about the matters of a fee estimate and a refusal to waive a fee under section 75 of the Act. However, I decided in Order No. 137-1996, December 17, 1996, that the burden of proof for the matter of a fee estimate is on the public body, in this case the Ministry, and in Order No. 90-1996, March 8, 1996, that the burden of proof for the matter of a fee waiver is on the applicant.

4. Procedural objections

The Ministry objected to the applicant's request for an adjournment on the eve of the day that reply submissions were due. I considered the applicant's detailed reasons for the request and other circumstances, such as all previous adjournments, and decided to grant an adjournment in the interests of fairness.

The Ministry also objected to the applicant's inclusion of an *in camera* submission of evidence in the form of several documents. The Ministry "submits that this evidence does not constitute proper *in camera* evidence, and if the Commissioner decides to consider the new arguments being advanced by the Applicant for a fee waiver, the [Ministry] submits that it is entitled to see this new evidence and respond to it if necessary." (Letter dated October 14, 1998 from the Ministry, p. 2)

The decision whether to accept any information in an inquiry on an *in camera* basis is one that I make on the basis of rules included in our Notices of Inquiry. In this inquiry, I find that it is appropriate for the applicant to submit evidence to me that supports its request for access to information, and I have accepted it on that basis. The one hundred pages of *in camera* records submitted by the applicant are not, in fact, necessary to establish the public interest argument of the Sierra Legal Defence Fund. Thus, while I have accepted the material as *in camera*, I have not found it necessary to rely on it to make my findings.

5. The Sierra Legal Defence Fund's case

Simply put, the applicant contends that the Ministry did not appropriately exercise its discretion under section 75(5) of the Act when it denied its request for a fee waiver. The applicant also contends that the fee estimate itself is unreasonable. It seeks a waiver of the fees imposed in response to its request or, alternatively, that the fees be reduced. I have discussed below its specific submissions.

6. The Ministry of Forests' case

The Ministry has submitted a detailed description of the Regulation Review Process that it undertook during the period of time specified in the applicant's request for access to correspondence. (Submission of the Ministry, paragraphs 1.12 to 1.22) The

applicant was part of the consultation table established in the spring of 1997. After announcing revisions to the *Forest Practices Code* on June 9, 1997, the Ministry proceeded to review the related regulations in a process that again involved counsel for the applicant, who eventually entered into a confidentiality agreement for that purpose. Several rounds of review of draft regulations resulted. The changes to the regulations were announced on April 2, 1998. According to the Ministry, "the applicant's request is directed at gathering all correspondence between specified members of the Council of Forest Industries [COFI] and the Public Body's Forest Development Section arising out of the confidential consultative process on changes to the Regulations."

The Ministry rejected the applicant's request for a fee waiver on the grounds that, simply, "we do not agree the records requested affected environmental standards nor provide a better understanding of law or policy." (Submission of the Ministry, paragraph 1.08) I note in passing that this was not a very reasoned or persuasive response to the applicant's detailed request for a waiver, a matter that I return to below.

I have presented below the Ministry's submissions on the application of section 75 of the Act in this inquiry.

7. Discussion

The context for this inquiry

Readers should be aware that beneath the simple exterior of this inquiry, some compelling societal issues are at stake about the management of forest resources in this province. The same government that proclaimed the *Forest Practices Code,* June 15, 1995, came under increasing pressure from industry to "water down" the requirements. Even the chair of the Forest Practices Board was critical of the revisions to the *Code* announced in 1998. (See affidavit of William Horter, Appendix L; and the Reply Submission of the SLDF, p. 5) Thus, this inquiry is simply the tip of the iceberg of an ongoing relationship: the Sierra Legal Defence Fund is among the leading environmental watchdogs in the province and a major user of the Act, while the Ministry of Forests is buffeted by political and industrial pressures. Thus, there is much more than meets the eye in this inquiry, even if my role is limited to applying the Act to the issues in dispute.

Section 75(5)(b): the record relates to a matter of public interest, including the environment or public health or safety

The applicant relies on the two-step process for my review of the exercise of a head's discretionary power to grant a fee waiver in the public interest developed for this purpose in Order No. 155-1997, March 18, 1997. (Submission of the SLDF, p. 2) The Ministry determined that this request did not meet the first step in this process, i.e., whether it is in the public interest. In the Ministry's view, Order No. 90-1996, p. 3, sought to establish a "substantial" burden on an applicant with respect to a review of a request for a fee waiver.

The applicant seeks correspondence between two named managers from the Ministry, and representatives of industry and lobbying groups, including the Council of Forest Industries, in the months preceding the most recent amendments to the *Forest Practices Code of British Columbia*: "The *Code* is the principal element in the domain of forestry legislation in BC and any changes to it or its legislation will have a significant impact on how forestry is practiced in BC." (Submission of the SLDF, pp. 2-3) The applicant's allegation is that the government committed itself to a three-part consultation process on all amendments to the regulations under the *Code*: "After releasing the first draft of the proposed changes, the MoF [Ministry of Forests] failed to circulate the second drafts as promised to the environmental community." (Submission of the SLDF, p. 3) The applicant continues:

> Furthermore, given the significant changes to forest management, public access to forest plans and assessment, and public review proposed in these amendments, it is clear that both the consultation process and the amendments themselves, clearly are in the public interest. Therefore, communications between these parties during this time frame would necessarily involve the proposed amendments to the *Code*. As such, they would certainly fall within the gambit of "public interest" as it is used in the *Act*. (Submission of the SLDF, p. 3)

Thus the applicant argues that its request for access to certain Forestry records is clearly in the public interest.

The applicant has also provided me with a detailed affidavit describing the development of Bill 47 (1997) that led to the amendments to the *Forest Practices Code*, which in its view "had a significant impact on the ability of the public to effectively participate in forestry decision making." (Affidavit of William Horter, paragraphs 6 to 37, and the accompanying appendices.) The applicant concludes that the changes to the regulations under the *Forest Practices Code* that the government introduced on April 2, 1998 have the effect of reducing environmental protection, making it more difficult to hold bad actors accountable, or reduce opportunities for public participation. (Affidavit of William Horter, paragraph 30; see also the first Reply Submission of the SLDF, p. 5)

Thus, the crux of the applicant's specific request in this inquiry is to try to establish whether extensive negotiations were taking place between the forest industry, as represented by the Council of Forest Industries, and the provincial government, including associates of Premier Clark and representatives of the logging industry, to the exclusion of the environmental community. (Affidavit of William Horter, paragraphs 22 to 28) The Ministry acknowledges that the correspondents involved in this inquiry, in addition to two of its own public servants, are four members of the Council of Forest Industries. (Submission of the Ministry, paragraph 1.10) The Ministry admits that the records in dispute "relate to proposed changes to Code Regulations." (Submission of the Ministry, paragraph 1.07, note 3)

With respect to the test for the application of section 75(5), the applicant further submits that its request "fits many of the requirements," since it acts as an advocate for the environment, providing free legal counsel to concerned individuals, First Nations, non-profit environmental organizations and community groups."

> Potential cases are screened by a broadly-based Board of Directors to ensure each action or issue we commit to represents a matter of significant or general public concern. Furthermore, in every case in which SLDF has gone before the court, and in every case before administrative tribunals such as the Forest Appeals Commission, SLDF has been granted public interest standing. (Submission of SLDF, p. 3)

The request in this inquiry involves the *Forest Practices Code*, which is one of the applicant's major ongoing projects. See Submission of the SLDF, p. 3, for the details.

Furthermore, the applicant has persuaded me that it has an established record of bringing information of environmental concern to broad public attention, in part through its web site, www.sierralegal.org. Its "only reason" for requesting the records in dispute in this inquiry is to disseminate them to the public. See also the affidavit of William Horter, paragraphs 38 to 43, and the accompanying affidavits. However, the affidavit of the applicant's main representative (counsel) in this inquiry also states:

> My purpose in seeking the requested records is to better understand the consultation which occurred during the "Regulatory Review Process," to use [the?] records for further analysis of the effect of *Code* and regulatory changes, and to use [the] records to prepare for upcoming consultations regarding further changes to *Code* Regulations. (Affidavit of William Horter, paragraph 37)

In this connection, I have carefully reviewed the sixteen-page affidavit of William Horter, the counsel representing the applicant, who is the coordinating lawyer for all of its forestry projects. He documents the work of his unit in facilitating access to information from the Ministry under the Act, both by his organization and the general public.

The Ministry has correctly noted that my powers under section 58(3)(c) of the Act are to "confirm, excuse or reduce a fee … in the appropriate circumstances…" The Ministry has also identified a number of Orders in which I have explored the range of options available to me in this regard. (Submission of the Ministry, paragraph 4.07) Its argument is that I should accord "a high degree of deference" to the head of the public body. In this connection, I agree that "appropriate fees are essential for the proper administration of the Act," and that public bodies are entitled to recover some of their actual costs:

> The Public Body further submits that the Legislature's choice of wording in section 75(5) " …if, in the head's opinion,…" shows an intent to make the heads of public bodies, being the individuals who are experienced and knowledgeable about the requested records, the sole judges of whether or not the grounds for fee waiver or reduction exist. The Commissioner's role is not to substitute his discretion for that of the head. The Commissioner's role is to monitor suspected abuses under section 75(5), and if the Commissioner determines that the head has abused his or her discretion, then "appropriate circumstance" may exist to warrant a fee reduction or waiver. (Submission of the Ministry, paragraph 4.08)

In principle, I accept this general formulation of my role under section 75(5). I do not accept the public body's notion that "appropriate circumstances" in section 58(3)(c) are limited only to those circumstances where I determine that the "head has abused his or her discretion."

The Ministry has clearly set out the competing views of whether the applicant's request for access is in the public interest as related to the environment. (Submission of the Ministry, paragraphs 4.10 and 4.11) These reasons were originally stated in a letter from the applicant of July 15, 1998 and in the Ministry's response of July 17, 1998. The applicant's second "detailed" request for a fee waiver on July 15 covered two packed pages of argument, which the Ministry dismissed in two sentences. The proximity of the dates and the brevity of the response indicate that the Ministry hardly had time to engage in a prolonged, or at least reflective, discussion of the merits of the applicant's case for a fee waiver, which I, in fact, find much more persuasive, for reasons reviewed above, than those of the Ministry.

I offer the following as an example of the Ministry's reasoning with respect to the public interest:

> The Applicant must show that records about the environment actually relate to a matter of public interest… The Public Body submits that the requested records would not disclose anything meaningful about the environment. Although the responsive records have not been retrieved and their actual contents cannot be ascertained with any degree of specificity, they are likely to simply reflect comments on ways to improve operational and administrative efficiencies in the forest industry. (Submission of the Ministry, paragraph 4.12; see also the Initial Reply Submission of the Ministry, paragraph 2)

In fact, all of us are almost literally in the dark as to the actual contents of the disputed records. But what is completely clear is that the applicant has different purposes in mind in terms of its prospective uses of the records in dispute, since it wishes to show, among other things, that the Ministry was negotiating intensively with leading members of COFI

while the Sierra Legal Defence Fund claims that it was effectively shut out of the consultative process. (See above, and the Reply Submission of SLDF, p. 1, and pp. 6-7):

> …the Applicant takes the position that recent changes to the *Code* weakened environmental standards and reduced public participation opportunities, and that the consultation process was skewed to favor forest industry interests. (Initial Reply Submission of SLDF, p. 9)

As the applicant further submitted in its reply submission, "[t]he Applicant was not consulted regarding many drafts of the proposed changes and was not consulted to the same degree as representatives from industry. In fact, [word added] drafts were provided to environmental stakeholders considerably later than the drafts were provided to industry." (Initial Reply Submission of SLDF, p. 4) Although the Ministry's position is that the latter were fully consulted during the review process, it also "does not deny, and has never denied, meeting with and receiving confidential comments on the draft Regulations from industry and the Forest Practices Board, as contemplated by the Regulation Review Process." (Initial Reply Submission of the Ministry, paragraph 1)

Having reviewed the above arguments, I will now proceed to consider whether the records relate to a matter of public interest and, if so, whether the applicant should be excused from paying the fee.

In Order No. 155-1997, I set out guidance in the form of factors for heads of public bodies to consider in deciding whether records relate to a matter of public interest for the purposes of section 75(5). In its first reply submission in particular, the applicant has carefully met its burden of proof in this regard by demonstrating, to my satisfaction, how its request met the relevant criteria for a fee waiver: (1) the information in dispute has been the subject of recent debate; (2) the subject matter of the records is directly related to the environment, public safety, or health; and (3) there would be a public benefit in disseminating the records. (Reply Submission of the SLDF, pp. 7-10) There is no need to rehearse these arguments again here, because they are reflected in the discussion above and below. I agree with the applicant that "there should be little question as to the public interest nature of the records requested." (Initial Reply Submission of the Applicant, p. 8)

The Ministry's ultimate argument is that, even if the requested records did relate to a matter of public interest, "appropriate circumstances do not exist for a fee reduction or fee waiver." (Submission of the Ministry, paragraph 4.13) Its view is that the resultant changes to the regulations under the *Forest Practices Code* are what are relevant to public scrutiny, not the comments from participants in the consultative process:

> If the Applicant's objective is to analyze, interpret and publicly disseminate information of environmental concern arising out of changes to the Regulations, then the correspondence they are seeking is not required for this purpose. (Submission of the Ministry, paragraph 4.15)

As I have noted above, however, the applicant seeks to review the records for other purposes that do appear to be clearly in the public interest. It is disingenuous for the Ministry to rely in this regard in an inquiry on the argument that "it is, and always has been, the position of the government that the Regulations would not compromise environmental standards." (Submission of the Ministry, paragraph 4.15) It is evident that the applicant, its environmental allies, and perhaps even the Forest Practices Board, take a different view of the matter.

There is an additional problem with the Ministry's position on the appropriateness of a fee waiver. It is not even clear in this inquiry whether the requested records could be disclosed when found, since, as the Ministry points out, they concern comments on draft regulations under a confidentiality agreement with the public body, and these might be excepted from disclosure under sections 12 or 13 of the Act. (Submission of the Ministry, paragraphs 4.15 and 4.16) But that condition has little to do with this request for a fee waiver in the public interest, which is the first step in this process of possible disclosure. It is conceivable that the applicant could obtain a fee waiver yet receive none of the records. (The reply submission of the applicant questions the continued relevance of the confidentiality agreement for the regulatory review process but, in my view, that is not a matter that need concern me in the present inquiry; Initial Reply Submission of the SLDF, p. 2)

The Ministry makes a final point with respect to the inappropriateness of a fee waiver in this inquiry: that the applicant is a frequent user of the Act. Since 1996, the SLDF has made approximately 52 formal requests to the Ministry, which makes it the second most frequent user of the Act for this Ministry in this time period. It also obtains other records that are routinely releasable without a formal access request. Finally, the applicant's requests "are often broad complex requests which require records searches at numerous Public Body offices throughout the Province, at times including every office in the Province." (Submission of the Ministry, paragraph 4.17) The Ministry states:

> The accumulated expenditures incurred by the Public Body in responding to the Applicant's requests have been significant, and the Public Body submits that this is a factor which favours the denial of a fee waiver in the circumstances of this case. (Submission of the Ministry, paragraph 4.17)

Again, I find this argument to be misguided. The statutory purposes of the Act "are to make public bodies more accountable to the public … by (a) giving the public a right of access to records…." (Section 2 of the Act) Although more than sixty percent of requests for access under the Act are individuals seeking their own personal information, these same people are less frequent users of the Act in terms of making general requests for information, at least from central government bodies. That is where applicants, such as the Sierra Legal Defence Fund, make such a fundamental contribution to the political process in this province by acting as surrogates for individual members of the public in trying to hold government accountable for its actions.

In Order No. 155-1997, I set out two factors for the head of a public body to consider in determining whether an applicant should be excused from paying all or part of the estimated fee. In its initial reply submission, the applicant has addressed both of these factors to my satisfaction: (a) is the applicant's primary purpose to disseminate information in a way that could reasonably be expected to benefit the public, or to serve a private interest? and (b) is the applicant able to disseminate the information to the public? The applicant submits as follows:

> The analysis, interpretation, and public dissemination of the information in records sought are the primary purposes of the Applicant's Information Request. The Applicant submits that it seeks the records for use in efforts to promote non-timber, environmental values, which is in the public interest. (Initial Reply Submission of the Applicant, p. 11; grammar silently corrected.)

In closing, I find that the applicant has met his burden of proof in demonstrating that the records in this matter relate to a matter of public interest and that the applicant's primary purpose is to disseminate the information in a way that could reasonably be expected to benefit the public.

Section 75(4): the reasonableness of a fee estimate

The applicant submits that in its experience with the Ministry of Forests, large fees in response to access requests "are becoming the norm and there are no clear guidelines to determine the reasonableness of fees." It submits that a fee of more than $400 for "23 response pages is unreasonable. We fear that should an unreasonably high estimate such as this go unchallenged, then the purpose of the *Act* will be thwarted. High estimates will intimidate and discourage people and organizations from exercising their right to public information" and become "an effective bar to accessing information." (Submission of the Applicant, p. 4)

The applicant believes that its request was well delineated and should have been simple to execute, not requiring the Ministry's estimate of seventeen hours of search time. Based on the counsel for the applicant's "working" knowledge of Ministry of Forest filing systems in its district offices around the province, he believes "that all correspondence related to proposed changes to the *Code*, the matter upon which I believe [the two managers for the Ministry] worked almost exclusively during the period in question would be kept within one or relatively few files. I do not believe Ministry of Forests needed to search 22,000 pages of records to identify correspondence related to what all parties expect to be one issue – the regulatory changes." (Affidavit of William Horter, paragraph 34)

The Ministry submits that the applicant has submitted no credible evidence of the unreasonableness of its fee estimate for searching records, which was based on the advice

of experienced employees knowledgeable about the records. (Submission of the Ministry, paragraph 3.02)

The Ministry has provided this inquiry with a description of its filing procedures with respect to the types of correspondence requested by the applicant. Such correspondence apparently covers "numerous topics relating to the Regulations under review and a large number of files would have to be searched in order for the Public Body to provide a complete and accurate response." This involves 22,200 pages of records in a four-drawer vertical file and part of a four-drawer lateral file cabinet. (Submission of the Ministry, paragraphs 4.02 and 4.03) The applicant submits that, if "the Public Body's filing and administrative systems are in such a state of disarray that 22,200 records must be searched to find correspondence from one consultative process, this is of public concern on grounds of efficiency and management of public resources alone." (Initial Reply Submission of the SLDF, p. 14)

I find it surprising that the Records Management Coordinator of the Forest Practices Branch asked the two named employees of the Ministry "as to the amount of time they estimated it would take to search the files which could contain records within the scope of the Applicant's request:"

> [She] was informed by [two employees] that in their judgment it would take 14.25 hours in total to locate and retrieve the requested records, and they estimated that 23 pages of records might be found. (Submission of the Ministry, paragraph 4.04)

Although I appreciate the fact that the two respondents would have knowledge of whether any records might be found, I am skeptical how much they would know about actual search time, given their senior responsibilities for management at the Ministry. On the other hand, staffing realities may mean that they would have to do the actual searches.

A Ministry official informed me, in an affidavit for the inquiry, that it has a rule of thumb of taking 15 minutes to search a one inch file of records, which would double the fee estimate originally given to the applicant: "Given the conservative nature of the estimate, the Public Body submits that from the Applicant's perspective, the fee estimate should be considered very reasonable." (Submission of the Ministry, paragraphs 4.05 and 4.06) With respect, I have to point out that the Ministry's latter reasoning is very much *ex post facto*. I do think that records staff are likely to be much better placed to make such judgements about the extent of search time than senior managers as, in fact, occurred with the preparation of the enhanced fee estimate.

I make no finding on the adequacy of the original fee estimate, in light of my conclusion that it should be waived.

Finding

I find that the subject matter of the access request is in the public interest as defined by section 75(5) of the Act and, given the particular facts in this inquiry, I find that appropriate circumstances exist in this case to excuse the fee.

8. Order

I find that the head of the Ministry of Forests failed to exercise proper discretion under section 75(5) of the Act. Under section 58(3)(c) of the Act, I therefore excuse the fee assessed by the Ministry of Forests to the Sierra Legal Defence Fund.

_____

David H. Flaherty
Commissioner

February 15, 1999